

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 14, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Affiliated Foods, Inc.
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Serial No. 88790990
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Bobby W. Braxton and Greg Perrone of Braxton Perrone, PLLC,
for Affiliated Foods, Inc.

Roger T. McDorman, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

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Before Cataldo, Coggins and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Affiliated Foods, Inc., applied to register the mark SAV-U-MOR (in standard characters) on the Principal Register for “Retail grocery stores” in International Class 35.¹ The Trademark Examining Attorney issued a final refusal to register the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on

¹ Application Serial No. 88790990 (“the Application”) was filed on February 10, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's claim of a bona fide intent to use the mark in commerce.

The application was reassigned from the original examining attorney to Mr. McDorman after the notice of appeal was filed. We will refer to both examining attorneys in the singular.

the ground that Applicant's mark, as used in connection with the aforementioned services, is likely to cause confusion with the marks shown below that are registered on the Principal Register in the name of Sav-Mor Drugs ("Registrant"):²

1. SAV-MOR... YOUR PHARMACY EXPERTS (standard characters) for "Pharmacy and retail drug store services and general merchandise store services; retail pharmacy services, namely, providing an automated interactive telephone ordering system and computer database for use by customers to order/refill prescriptions," in International Class 35; and



2. (DRUG STORES disclaimed) for "Retail pharmacy services, retail drug store services and retail general consumer merchandise store services" in International Class 35.

Applicant appealed and requested reconsideration, which was denied. The appeal has been briefed. We affirm the refusal.

I. Likelihood of Confusion

The fundamental purpose of Trademark Act Section 2(d) is to prevent confusion as to source, and to protect registrants from damage caused by registration of marks likely to cause confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*") (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors").

² Registration No. 3265167 ("the '167 Registration"), the first listed registration, was issued on July 17, 2007 and was renewed. Registration No. 3501257 ("the '257 Registration"), the second, was issued on September 16, 2008 and was renewed (Collectively, "the Registrations").

In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks.”).

A. Similarity or Dissimilarity of the Services, Channels of Trade, and Classes of Customers

We begin with the second and third *DuPont* factors, which address the relatedness of the respective services, their trade channels, and classes of consumers. The services need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief

that [they] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

When considering the services, trade channels and classes of customers, we must make our determinations based on the services as they are recited in the Application and the Registrations. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

The Examining Attorney contends that the respective services are closely related because “applicant’s retail grocery store services may be seen as encompassed by the ‘general merchandise’ featured in registrant’s retail store services, in that groceries are a type of merchandise and ... grocery stores commonly sell other types of general merchandise such as toys, batteries, cookware and utensils, personal care products and cleaning products.”³ “To the extent the services are not overlapping or encompassing,” he argues, “they are related in that they are marketed to the same consumers through the same trade channels and/or are often associated with a single source.”⁴ Specifically, “the same entity commonly provides the relevant services and markets the services under the same mark. Thus, the services at issue are likely to be provided through the same channels of trade and encountered by the same classes

³ 8 TTABVUE 12 (Examining Attorney’s Brief).

⁴ *Id.* at 13.

of consumers.”⁵

The Examining Attorney provided third-party website evidence supporting his contention “that the same entity commonly provides the applicant’s retail grocery store services, as well as the registrant’s retail pharmacy or drug store services.”⁶ For example, national chain retail grocery stores⁷ Giant (giantfood.com), Shoprite (shoprite.com), Harris Teeter (harristeeter.com), Kroger (kroger.com), Safeway (safeway.com), Acme (acmemarkets.com), and Price Chopper (pricechopper.com), in addition to offering grocery store services, also offer pharmacy and retail drug store services.⁸ At the same time, national chain pharmacies like CVS (cvs.com), Walgreens (walgreens.com), and Rite Aid (riteaid.com), offer grocery store services.⁹

This evidence, showing that the same entity commonly provides both kinds of services under the same mark in the same retail store, supports the Examining Attorney’s position that Applicant’s and Registrant’s services are related for likelihood of confusion purposes. As the Court of Appeals for the Federal Circuit has stated, evidence that “a single company [provides the] services of both parties, if

⁵ *Id.*

⁶ *Id.* at 13-14; April 12, 2020 Office Action, TSDR 16-24; November 24, 2020 Final Office Action, TSDR 40-60, 108-117.

⁷ A “grocery” is “a store selling foodstuffs and various household supplies. Also called a *grocery store*.” “Groceries” are “commodities sold by a grocer.” THE AMERICAN HERITAGE DICTIONARY (ahdictionary.com), accessed March 3, 2022. The Board may take judicial notice of dictionary definitions from online sources when the definitions themselves are derived from dictionaries that exist in printed form or have regular fixed editions. *See, e.g., In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

⁸ April 12, 2020 Office Action, TSDR 16-24; November 24, 2020 Final Office Action, TSDR 40-60, 108-117.

⁹ November 24, 2020 Final Office Action, TSDR 61-107.

presented, is relevant to a relatedness analysis.” *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). *See also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1047 (Fed. Cir. 2018) (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that [provides] both”).

In addition to the Internet use evidence discussed above, the Examining Attorney also made of record various use-based third-party registrations of marks he contends are “registered for use in connection with the same or similar services as those of both applicant and registrant in this case,” and “show[] that the services listed therein, namely, the applicant’s grocery store services, as well as the registrants’ [sic] drug store and pharmacy services, are of a kind that may emanate from a single source under a single mark,”¹⁰ including the following seven registrations that we find particularly relevant:

- Reg. No. 5424731 (B-NOON) for services including, inter alia, retail and online retail store services featuring a wide variety of consumer goods of others, retail and on-line grocery store services, retail convenience stores, retail drug store services, retail drug stores, retail grocery stores, and retail variety stores, in Class 35;
- Reg. Nos. 5382525 (ROCK THIS CHRISTMAS) and 60038892 (NEW LOOK. NEW SERVICES. SAME LOW PRICES.), owned by the same registrant, for services including, inter alia, retail store services featuring a wide variety of consumer goods, retail grocery stores, and retail pharmacy services, in Class 35;

¹⁰ 8 TTABVUE 14 (Examining Attorney’s Brief); November 24, 2020 Final Office Action, TSDR 8-39).

- Reg. No. 5822872 (WIGO FOOD) for services including retail drug stores and retail grocery stores, in Class 35;
- Reg. No. 6041770 (GREEN FOREST MARKET) for retail pharmacy services and retail grocery stores, in Class 35;
- Reg. No. 6112699 (VEGA and Design) for on-line wholesale and retail store services featuring groceries, health, beauty and personal care products, household essentials, home improvement products, office supplies, holiday and celebration supplies, jewelry and pet products; retail and online retail grocery store services; retail bakery shops; retail delicatessen services; retail pharmacy services; retail store services featuring a wide variety of consumer goods of others; supermarkets, in Class 35; and
- Reg. No. 6191681 (A WORLD OF FOOD FROM HERE & FAR) for supermarket services, retail grocery stores, retail pharmacy services, online grocery store services, and retail store services featuring groceries and pharmacy items provided via downloadable mobile applications, in Class 35.

Third-party registrations of this sort serve to suggest that Applicant's and Registrant's services are of a type that may emanate from a single source, and corroborate the relatedness of the services shown by the Examining Attorney's use evidence discussed above. *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, *13 (TTAB 2020).

Based on the foregoing, it is clear to us that Applicant's and Registrant's services are closely related and overlapping. Indeed, as the Examining Attorney's evidence amply demonstrates, grocery store services and retail pharmacy services overlap because pharmacies or drug stores often provide groceries, and grocery stores or supermarkets often provide pharmacy and drug store services. In addition, retail grocery stores sell non-food commodities such as dishwashing detergent, toys,

household cleaning products, batteries, and the like, which may be considered “general merchandise” and thus fall within the broad “general merchandise stores services” recited in the Registrations.¹¹ Moreover, as shown by the evidence, retail grocery store services as recited in the Application, and pharmacy/drug and general merchandise store services as identified in the Registrations, are provided within the same stores and, hence, the same trade channels, to the same classes of customers.

The second and third *DuPont* factors favor a finding of likelihood of confusion.

B. Similarity or Dissimilarity of the Marks in their Entireties

We turn now to the first *DuPont* factor, which considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

The emphasis of our analysis must be on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections of them

¹¹ April 12, 2020 Office Action, TSDR 16-24; November 24, 2020 Final Office Action, TSDR 40-60, 108-117.

over time. *Mucky Duck*, 6 USPQ2d at 1468. We thus remain mindful that “marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014).

Nevertheless, it is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.”).

Applicant’s mark is SAV-U-MOR (in standard characters), and Registrant’s marks are SAV-MOR...YOUR PHARMACY EXPERTS (in standard characters) and SAV-MOR DRUG STORES and Design (DRUG STORES disclaimed), displayed as



. The Examining Attorney argues that:

The marks are similar in sound, appearance, and connotation because of the dominant wording “SAV-(U-)MOR” common to all the marks; that is, the dominant term in the marks begins with “SAV-” and ends with “-MOR”. The applicant’s addition of “U” between “SAV-” and “-MOR” does not appreciably alter the commercial impression of the mark or distinguish it from the dominant elements of the cited marks. That is, the general overall impression of all the marks—with or without the “U”—is that the user of the services can enjoy greater savings and/or purchase items at a lower cost than would otherwise be expected.¹²

¹² 8 TTABVUE 6-7 (Examining Attorney’s Brief).

The Examining Attorney further contends that neither the “highly suggestive slogan ‘YOUR PHARMACY EXPERTS’” in the ’167 Registration, nor the disclaimed “descriptive or generic” “addition of ‘DRUG STORES’” in the ’257 Registration, obviates a finding likelihood of confusion. We agree.

Customers are generally more inclined to focus on the first portion of any trademark or service mark, especially where that first portion is followed by highly descriptive or generic terms, such as YOUR PHARMACY EXPERTS in the ’167 Registration. *See e.g., Detroit Athletic Co.*, 128 USPQ2d at 1049 (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because “consumers must first notice th[e] identical lead word”); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions).

Additionally, disclaimed matter that is descriptive of or generic of a mark’s services is typically less significant or less dominant when comparing marks. *See Detroit Athletic Co.*, 128 USPQ2d at 1050 (citing *Dixie Rests.*, 41 USPQ2d at 1533-34). Given “the penchant of consumers to shorten marks,” *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring) (“the users of language

have a universal habit of shortening full names--from haste or laziness or just economy of words”)), and the descriptive or generic nature of DRUG STORES in the '257 Registration, it is unlikely that consumers will rely on that term for purposes of distinguishing the marks. *See Detroit Athletic Co.*, 128 USPQ2d at 1049 (“[N]on-source identifying nature of the words and the disclaimers thereof constitute rational reasons for giving those terms less weight in the analysis.”); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1188 (TTAB 2018) (“consumers often have a propensity to shorten marks” when ordering goods or services orally).

Applicant argues that the respective marks are “most noticeably dissimilar in appearance” because Applicant’s mark “includes the term ‘U’ in the middle of the phrase” and “[r]ather than simply saving more, applicant’s mark states **who** will be saving.”¹³ Applicant further asserts that that “‘Sav-U-Mor’ rolls off the tongue quickly whereas ‘Save-Mor’ sounds different.”¹⁴

While we acknowledge that the added “U” in Applicant’s SAV-U-MOR mark results in a term that is slightly different in appearance and sound from the term SAV-MOR in the Registrations, these differences are rather insignificant. SAV-MOR in the Registrations also clearly connotes that it is consumers **who** will save more on the goods purchased through Registrant’s retail store services. Given the lesser degree of similarity between the marks needed to find a likelihood of confusion where the services are closely related, as they are here, this similarity in connotation carries

¹³ 6 TTABVUE 6 (Applicant’s Brief, emphasis added).

¹⁴ *Id.*

the day. *Century 21 Real Estate Corp. v. Century Life of Am.*, 23 USPQ2d at 1700 (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”); *In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1773 (TTAB 2014) (“[T]he more similar the goods [or services] at issue, the less similar the marks need to be for the Board to find a likelihood of confusion.”).

Applicant also notes that the mark in the ’257 Registration, , includes the “Rx” prescription symbol in its stylization, which Applicant argues avoids any confusion.¹⁵ However, similar to the term DRUG STORE in Registrant’s ’167 Registration that is merely descriptive or generic for Registrant’s services, the Rx symbol is suggestive of Registrant’s services and does not detract from the overall similarity in connotation shared by the marks when considered in their entirety.

The first *DuPont* factor favors a finding of likelihood of confusion.

II. Conclusion

Having considered all evidence and arguments bearing on the relevant *DuPont* factors, including similarity of the marks, services, and trade channels, we conclude that Applicant’s mark SAV-U-MOR for “Retail grocery stores” is likely to cause confusion with Registrant’s marks (1) SAV-MOR... YOUR PHARMACY EXPERTS for “Pharmacy and retail drug store services and general merchandise store services; retail pharmacy services, namely, providing an automated interactive telephone

¹⁵ *Id.*

ordering system and computer database for use by customers to order/refill

prescriptions,” and (2)  for “Retail pharmacy services, retail drug store services and retail general consumer merchandise store services.”¹⁶

Decision: The refusal to register is affirmed under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

¹⁶ Although Applicant also argued against refusals based on likelihood of confusion with Registration Nos. 2705627 and 2660794, those refusals were withdrawn in the Examining Attorney’s July 23, 2021 Reconsideration Letter.